disgrace and infamy which would naturally result from his disclosures; and, secondly, that Congress was exceeding its power in attempting to protect the witness from prosecution, the pardoning power being exclusively a prerogative of the President. As to the first of these arguments, it is difficult to find any authority for it beyond the early case of *Respublica* v. *Gibbs*, 3 Yeates, 429. The well settled rule, that, if prosecution for the crime is barred by the Statute of Limitations, the witness must testify, is inconsistent with such a view. And it certainly seems on general principles that the constitutional provision was not intended to be pushed to such an extent. The second argument put forward by Mr. Justice Field seems to have even less weight. As is pointed out in the majority opinion, statutes of this sort, which are virtually acts of general amnesty, are by no means uncommon, either in England (see 2 Taylor on Evidence, § 1455) or in this country, and they have, almost without exception, been held constitutional. *State* v. *Nowell*, 58 N. H. 314; *People* v. *Sharp*, 107 N. Y. 427; *Ex parte Cohen*, 104 Cal. 524.

The three remaining dissenters, speaking through Mr. Justice Shiras, advance what appears to be a stronger argument. Their contention is that it is beyond the power of Congress to grant immunity from prosecution in the courts of a State for an offence against the State; that therefore the protection afforded the witness by the statute is not coextensive with the constitutional privilege. It hardly seems a satisfactory answer to this to say, with the majority of the court, that the applicability of a federal statute of this sort may well extend to the State courts under the sixth article of the Constitution. On the contrary, it is somewhat difficult to believe that Congress can order a State court to refrain from prosecuting an offender against the State. The true answer to the argument of the dissenting judges would appear to be that the constitutional protection is solely against prosecutions of the government that grants it; that if the witness is guaranteed against prosecution in the federal courts, the fifth amendment is complied with. The possibility of prosecution in a foreign country would not warrant the withholding of self-incriminating testimony. (See the opinion of Cockburn, C. J., in *Queen* v. *Boyes*, 1 B. & S. 311, 330.) Why should not this rule apply as between the federal jurisdiction and the States?

The decision of the court in *Brown* v. *Walker* seems on the whole sound in point of constitutional law. And the added power it gives to the Interstate Commerce Commission certainly renders it very satisfactory from a practical point of view.

THE RELATION OF A RECEIVER OF A CORPORATION TOWARDS ITS EXECUTORY CONTRACTS. — When a receiver is appointed to administer the assets of a corporation, the same phrase is commonly used to describe his relation towards the executory contracts of the corporation which is used to describe the relation of an assignee in bankruptcy towards the contracts of his insolvent or the relation of a person just come of age to his contracts made during infancy; namely, that he has a "reasonable time" in which to determine whether to affirm or disaffirm. It seems generally to have been assumed that the other incidents of the doctrine of reasonable time, as applied in the two cases named, apply also to a receiver; and, among them, that if with a knowledge of all the circumstances he either neglects unnecessarily to communicate his disaffirmance,

or does acts under the contract, he will be held thereafter to have precluded himself, however burdensome the contract may be, from throwing it up. This theory that a receiver is subject to the ordinary rules of election has had several rude shocks during the last ten years, notably in the familiar Wabash Railroad cases (*Quincy R. R. Co.* v. *Humphreys*, 145 U. S. 82; *Central Trust Co.* v. *Railroad Co.*, 150 U. S. 287); and also, recently, in Massachusetts (*Bell* v. *American Protective League*, 163 Mass. 158). The latter case is strong; a receiver, who had retained the lease of certain premises for over a year, with the avowed intention of selling the lease for the benefit of the trust estate, was held not liable for rent after he had finally decided, in defiance of the protest of the lessor, to throw up the lease. In spite of these decisions, however, the old *dicta* have continued to be repeated as regards the duty of electing "within a reasonable time."

A case decided by Judge Jenkins, March 22, 1896, in the Circuit Court for the Eastern District of Wisconsin, *Stewart et al* v. *Wisconsin Central Co., in re Clybourn Park Company, petitioner* (not yet reported), shows conspicuously, however, how misleading the phrase has become. In this case the petitioner had taken from the railroad company a ten year lease of a tract of land, for the purpose of improving this tract and using it as a picnic ground; and by a covenant of the lease the railroad company bound itself to furnish cars for picnics at the rate of $17 a car. Receivers were appointed for the railroad company in September, 1893, after the close of that year's picnic season. During the spring of 1894 the receivers made investigations, and it was admitted that by July 2, 1894, they had actually made up their minds to disaffirm the executory portion of the contract, on the ground that it was burdensome to the trust estate. Meanwhile, however, the petitioner had made arrangements for its summer business and was actually conducting picnics, and pending their final decision the receivers had been accepting this business upon the old terms. After making up their minds that the contract ought ultimately to be disaffirmed, the receivers continued to operate under its provisions until the close of the season; and it was not until August 29, 1894, that they first notified the petitioner of their intention to abrogate the $17 rate. As counsel for the petitioner said at the argument, if the doctrine exists that an election to affirm may be fastened on receivers, independent of the actual intention so to elect, by mere acts done after they have had time enough to decide, it would be impossible to imagine a clearer case for its application; for the "reasonable time" for making a decision must at least have expired when they actually made it; and they acted under the contract for two months more. It also appeared, however, that, so far from being injured by the delay, the petitioner would have suffered considerable loss if notified at any time subsequent to a date when the reasonable time for decision had clearly not elapsed, and that it made profits of several thousand dollars which it would not have made if the receivers had communicated their decision on July 2 or earlier. There was another point in the case upon which the right of the petitioner to equitable relief was denied, on the ground that it did not come into court with clean hands. But the alternative prayer for damages for non-performance of the contract during 1895 was explicitly denied by the court, on the ground that the election to disaffirm made in August, 1894, was a valid election, and terminated the contract.

The court says: "I am inclined to think that under the peculiar circumstances of this case, they [the receivers] cannot be charged with negligent delay, *although the court cannot see that a definite conclusion could not have been sooner reached.* It may be said, however, that the delay. . . . . did not in any way operate to the prejudice of the Clybourn Park Company, because the receivers appear to have acted upon very equitable considerations in carrying out the contract during the year 1894, when it appeared that the Clybourn Park Company had made arrangements and entered into contracts for that season; so that the question of time within which the receivers acted ought not under the circumstances *to be deemed unreasonable.*" The last phrase is unfortunate. As used in ordinary cases of election, the criterion of "reasonableness" is whether the party electing has had time intelligently to make up his mind. Having done this, he must notify the other party immediately; he has no farther leeway. The court in the case above cited would have done the profession a service if it had said — what the decision means — that the artificial rule of strict election does not apply to receivers at all. Whether they are bound or not — independently of express election to be bound — is determined by balancing the substantial equities: Has the petitioner been diligent in asserting his rights? Have the receivers misled him to his hurt? Have they made profits out of his property during the time of delay?

A PHYSICIAN'S DUTY OF SECRECY. — Considerable discussion of this topic has been provoked by the case of *Kitson* v. *Playfair*, fully reported in the *London Times* of March 23d and the days following. This case, however, did not involve the point, for the defendant pleaded privileged communication in an action of libel and slander, and the jury found malice in fact. In a proper form of action the question then is: What right must a plaintiff rely upon to recover from a physician for the disclosure of a professional secret? The nature of the relation between physician and patient seems to be similar to the relation between principal and agent, bailor and bailee. Except for clearness, it is immaterial by what name it is known; whether, as is frequently done in agency, it is spoken of as a status, or whether some other term is applied to it. Under all circumstances, the fundamental nature of the right remains. It does not arise merely from the physician's being a member of society, and is not a duty owed to the public generally, and, therefore, it is not strictly proper to call its violation a tort; nor can it be said to be a duty assumed by contract, for though there may generally be a consideration, consideration is not essential, and when present would be of but slight importance in measuring the duty assumed. The foundation of this duty has very aptly been called an "undertaking." See article on "Gratuitous Undertakings," 5 HARVARD LAW REVIEW, 222. It is one of the recognized rights, so much discussed of late, the breach of which does not belong to either of the great classes of tort or breach of contract.

What is "undertaken" is a question of fact. It is clear that a physician "undertakes" to use that degree of skill which modern practice demands under the circumstances, and also such skill as may reasonably be expected of him from his individual record. Is there more? Does he "undertake" to keep secret whatever he discovers or is told while acting professionally? It would seem so. This is an obligation clearly recognized in the ethics of the profession, and it would seem to be a legal duty